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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

AMANDA RUSHING, et al.,

Plaintiffs,

v.

VIACOM INC., et al.

Defendants.

CASE NO. 3:17-CV-04492-JD

PLAINTIFFS' OPPOSITION TO THE VIACOM DEFENDANTS' MOTION TO COMPEL ARBITRATION

Judge: Hon. James Donato
Date: February 1, 2018
Time: 10:00 a.m.
Courtroom: 11

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES
(continued)

Page

I. INTRODUCTION

Defendants Viacom Inc. and Viacom International Inc. (collectively, "Viacom") move to compel arbitration of Plaintiffs' claims based on Viacom's unenforceable browsewrap agreement. Viacom's motion should be denied. Browsewrap agreements generally take the form of a simple link to the app's terms and conditions, and do not require that app users take any affirmative action to specifically view the link or otherwise assent to those terms. Because browsewrap agreements risk binding users to terms and conditions that they might never see and which might fundamentally impact their rights, their enforceability is carefully scrutinized. Under controlling Ninth Circuit authority, browsewrap agreements are unenforceable without (1) a conspicuously placed hyperlink that is not "buried" on the website (or app), and (2) an *additional*, conspicuous textual notice that by performing some further action – for example, clicking a button or even continuing to browse the website or app – the visitor is agreeing to be bound by the hyperlinked terms. *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171 (9th Cir. 2014). Viacom fails the *Nguyen* test on *both* prongs—at no point during the download of *Llama Spit Spit*[1] or at the game's start screen is a user presented with a conspicuous hyperlink *or* an additional notice directing one's attention to such link.

Indeed, Plaintiffs Amanda Rushing and her daughter, L.L., never assented in any way to Viacom's EULA, nor is such assent required in order either to download or to play the game at issue, *Llama Spit Spit*. Rather, users download and play the game without ever being apprised of the EULA, much less agreeing to it.

[1] Viacom devotes portions of its Motion to discussing contract formation issues in Game Tracking Apps beyond *Llama Spit Spit*. (Motion of Defendants Viacom Inc. and Viacom International Inc. for Stay Pending Arbitration ("Motion" or "Mot). at 5, 9-11, Dkt. 66; Ortiz Decl. ¶¶ 9, 18-20.) However, this misreads the allegations in the Complaint. Beyond *Llama Spit Spit*, Plaintiffs did not download any of the Game Tracking Apps listed in the Complaint or discussed by Viacom in its Motion. (Class Action Complaint ("Compl.") ¶¶ 3, 69-73.) Rather, Plaintiffs simply identified substantially similar Game Tracking Apps (*Id.* ¶ 35) containing the same SDKs as *Llama Spit Spit* and exhibiting the same data-exfiltrating behavior (*Id.* ¶¶ 35-38). Therefore, the context of those apps is irrelevant to whether Plaintiffs entered into any agreement to arbitrate this dispute. Viacom recognizes this in the final footnote of its brief. (Mot. at 14, n. 9.) Although Plaintiffs dispute Viacom's characterization of the circumstances surrounding the download and play of those additional Game Tracking Apps, Plaintiffs will not address those disputes at this time since Plaintiffs never downloaded those apps and such circumstances are therefore irrelevant to whether the parties entered into an agreement to arbitrate this dispute.

It is undisputed that arbitration is a matter of contract. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745 (2011). Because no valid agreement to arbitrate exists between the Parties, the Court should deny Viacom's Motion. Similarly, because no agreement exists, the Parties did not confer any rights regarding the determination of scope or enforceability to an arbitrator, and thus all threshold issues are properly resolved by the Court rather than by a third-party arbitrator as Viacom demands. Accordingly, Viacom's Motion should be denied in its entirety.

II. THE FACTUAL CIRCUMSTANCES SURROUNDING THE DOWNLOAD AND PLAY OF VIACOM'S *LLAMA SPIT SPIT* APP. [2]

Plaintiff Amanda Rushing downloaded Viacom's *Llama Spit Spit* app for her daughter, Plaintiff L.L., on March 25, 2017 via Apple's App Store.[3] L.L. then played the game on an ongoing basis, ostensibly seeing the start screen described in the Declaration of Alex Ortiz ("Ortiz Decl.") (ECF No. 66-1 ¶ 17, figure 6) each time she played the game. (Compl. ¶ 69.) While playing *Llama Spit Spit*, L.L. had her personal data exfiltrated and used for profiling purposes via advertising SDKs installed in the app. (*Id.* ¶ 70.)

A. Downloading *Llama Spit Spit*

Apple users can download *Llama Spit Spit* in the App Store, where a download page for the app shows multiple vibrantly-colored, cartoonish images from the game and contains the description: "The spit is on! Defeat hipster enemies as you collect coins, power-ups and crazy llama costumes. Llama-tastic scores can land you on the leaderboard…**more**." (Addendum,[4] Fig. 1; Ortiz Decl. ¶ 13, Fig. 3.) The potential user is not presented with any notification regarding the availability of any terms of service governing the app. If someone wishes to

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[2] Plaintiffs respectfully refer the Court to their concurrently-filed Brief in Opposition to Defendants' Preemption Motion and incorporate the factual recitation regarding Defendants' illegal tracking of children and the nature of Plaintiffs' claims arising therefrom.

[3] Because Plaintiffs did not download *Llama Spit Spit* from the Google Play website, the characteristics of that webpage have no relevance to whether Plaintiffs entered into an agreement to arbitrate this dispute. However, as Viacom notes, the circumstances surrounding the download and play of *Llama Spit Spit* are very similar in the Google context.

[4] For the Court's convenience, Plaintiffs have provided an Addendum attached to this brief, which contains images from the Ortiz Declaration that are referenced throughout.

download the game, she does so by clicking a large, blue button marked "GET" in the top-right of the screen. (*Id.*) At no point must she click the "more" hyperlink in order to download the game.

However, if the user *were* to click the "more" hyperlink, additional text appears on the download screen. (Addendum, Fig. 2; Ortiz Decl. ¶ 13, Fig. 4.) At the bottom of this new text are several URLs, including one for an "End User License Agreement." (*Id.*) However, this URL is not a functional hyperlink – it cannot be clicked on, nor can it be copied and pasted. (Declaration of Michael Pollock ("Pollock Declaration" or "Pollock Decl.") ¶¶ 6-8, 10.) In other words, one cannot *read* or otherwise *access* the End User License Agreement from the Apple Store download page, or at any point in the process of downloading the game.

B. *Llama Spit Spit*'s start screen

When a child opens *Llama Spit Spit* to play the game, she is presented with an animated start screen, in which the game's main character – a cartoon llama – caroms through space. (Addendum, Fig. 3; Ortiz Decl. ¶ 17, fig. 6; Pollock Decl. ¶¶ 11-19.) As demonstrated by the Pollock Declaration and its accompanying videos, the child can immediately begin playing *Llama Spit Spit* without clicking any of the various hyperlinks on the screen, and the child is not presented with any notification of the existence of "terms of service." (Pollock Decl. ¶¶ 11-19.) Nor is there any indication that by continuing to play, the child is agreeing to an unreferenced set of terms. (*Id.*) The initial screen does include a reference to a "Privacy Policy" in the bottom far-left corner. (Addendum, Fig. 3; Ortiz Decl. ¶ 17, fig. 6.) If a child were to click on those words, she would see a new screen containing four new hyperlinks, one of which is the "Privacy Policy" and another the "EULA." (Addendum, Fig. 4; Ortiz Decl. ¶ 17, fig. 7.) This page—accessible only if the child clicks the link labeled "Privacy Policy"—does not include any reference to "terms of service" or an "end user license agreement," but contains only the vague "EULA" acronym. (*Id.*) Nor is there any indication that by continuing to play the game, the child is agreeing to any terms of service or end user license agreement that she neither saw nor assented to. (*Id.*) There is no explanation for what "EULA" means, nor any indication of game play being conditioned on its acceptance. (*Id.*) If a child were to click on the "EULA" link, she would then be presented with Viacom's end user license agreement, in which she could find an

arbitration provision only after scrolling to paragraph 14 of the document. (Pollock Decl. ¶¶ 14-19.) It is this arbitration provision that Viacom alleges covers this dispute.

III. ARGUMENT

Plaintiffs did not agree to arbitrate their claims, nor did they agree to any of the terms in Viacom's EULA. Viacom's browsewrap agreement did not put Plaintiffs on sufficient notice of its terms, nor did it solicit or obtain Plaintiffs' assent. Therefore, no valid contract was formed and the arbitration agreement is unenforceable.

A. Arbitration is a matter of contract, and no contract was entered into by the parties.

The U.S. Supreme Court has repeatedly explained that "arbitration is a matter of contract." *Concepcion*, 131 S. Ct. at 1745 (internal quotation marks and citation omitted). In determining whether a valid arbitration agreement exists, federal courts "apply ordinary state-law principles that govern the formation of contracts." *First Options of Chic., Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Viacom, "as the party seeking to compel arbitration, has the burden of proving the existence of an agreement to arbitrate by a preponderance of the evidence." *Mitchell v. U-Haul Co. of Cal.*, No. 16-cv-04674-JD, 2017 U.S. Dist. LEXIS 79064, at *1 (N.D. Cal. May 23, 2017) (Donato, J.) (citing *Knutson v. Sirius XM Radio Inc.*, 771 F.3d 559, 565 (9th Cir. 2014)). The Federal Arbitration Act ("FAA"), therefore, is not relevant to the threshold issue of whether the parties entered into an agreement to arbitrate. *See, e.g., Concepcion*, 131 S. Ct. at 355 (The FAA "would require enforcement of an agreement to arbitrate *unless* a party successfully asserts a defense concerning the formation of the agreement to arbitrate . . . .") (Thomas, J., concurring) (emphasis added). "[T]he FAA does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that arbitration proceed *in the manner provided for in [the parties'] agreement*." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474–75 (1989) (internal quotation marks omitted) (alteration in original). "[A] party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *In re Henson*, 869 F.3d 1052, 1059 (9th Cir. 2017) (quoting *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 648 (1986)).

Further, in establishing the very existence of an agreement to arbitrate, "there is no thumb on the scale in favor of finding an arbitration agreement to exist." *Norcia v. Samsung Telecomms. Am., LLC*, No. 14-cv-00582-JD, 2014 WL 4652332, at, *4 (N.D. Cal. Sep. 18, 2014) (Donato, J.), *affirmed, Norcia v. Samsung Telecomms. Am., LLC*, 845 F.3d 1279 (9th Cir. 2017). "[T]he 'liberal federal policy regarding the scope of arbitrable issues is inapposite' when the question is 'whether a particular party is bound by the arbitration agreement.'" *Id.* (quoting *Comer v. Micor, Inc.*, 436 F.3d 1098, 1104 n.11 (9th Cir. 2006)).

B. California contract law applies to the analysis of Viacom's EULA.

California contract law governs this dispute. "Federal courts sitting in diversity look to the law of the forum state when making choice of law determinations." *Hoffman v. Citibank (South Dakota), N.A.*, 546 F.3d 1078, 1082 (9th Cir. 2008). Under California's choice-of-law analysis, New York law would apply only upon Viacom's showing, among other things, that New York law "materially differs from the law of California." *Washington Mut. Bank, FA v. Super. Ct.*, 24 Cal. 4th 906, 911 (Cal. 2001). Absent such a showing, California law is applied. *Id*. Viacom concedes that "the contract formation principles addressed here are generally accepted regardless of jurisdiction." (Mot. at 8, n. 8.)

Further, because Viacom's EULA is unenforceable, its choice-of-law provision is void. "[W]hether the choice of law provision applies depends on whether the parties agreed to be bound by [the defendant's] Terms of Use in the first place." *Nguyen v. Barnes & Noble Inc.*, 763 F.3d 1171, 1175 (9th Cir. 2014); *In re Henson*, 869 F.3d at 1059 ("A choice-of-law clause, like an arbitration clause, is a contractual right and generally may not be invoked by one who is not a party to the contract in which it appears.") (quoting *Paracor Fin., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1165 (9th Cir. 1996)).

C. A browsewrap agreement is enforceable only when it is conspicuous and the user is on notice that continued use connotes acceptance of the terms.

Under California law, "[m]utual manifestation of assent, whether by written or spoken word or by conduct, is the touchstone of contract," and without sufficient indicia of assent by any of the parties, no contract is formed. *Nguyen*, 763 F.3d at 1175 (quoting *Specht v. Netscape*

Commc'ns Corp., 306 F.3d 17, 29 (2d Cir. 2002) (applying California law)). "An agreement requires mutual assent, generally achieved through an offer and acceptance. An offer that no reasonable person would recognize as a proposal…does not count." *Norcia*, 2014 WL 4652332, at *8 (citation omitted). It follows that "an offeree, …is not bound by inconspicuous contractual provisions of which he was unaware, contained in a document whose contractual nature is not obvious." *Windsor Mills, Inc. v. Collins & Aikman Corp*., 25 Cal. App. 3d 987, 993 (1972).

Viacom's EULA is an unenforceable browsewrap agreement. "Browsewrap" agreements often contain the website's or app's terms and conditions, but do not require that users take any affirmative action to assent to those terms. *Nguyen*, 763 F.3d at 1776. Browsewrap agreements stand apart from the other major type of Internet contract – "clickwrap" agreements – which require the visitor to check a box or perform some other, explicit and recordable action indicating agreement to be bound by the terms. *Id*. Because browsewrap agreements provide "no evidence that the website user had actual knowledge of the agreement, [their] validity…turns on whether the website puts a reasonably prudent user on inquiry notice of the terms of the contract." *Id.* at 1177 (citing *Specht*, 306 F.3d at 30-31). Viacom fails to do this with its EULA.

In *Nguyen v. Barnes & Noble Inc.*, the Ninth Court established a three-part test for determining a browsewrap agreement's enforceability. *Nguyen* requires: (1) conspicuously-placed, hyperlinked terms of use; (2) "other notices given to users" that direct their attention to the terms of use hyperlink;[5] and (3) the court take into account "the website's general design . . ." *Nguyen*, 763 F.3d at 1177. In *Nguyen*, the Court considered a hyperlink clearly labeled "Terms of Use," which was presented in an underlined, green typeface on the bottom left-hand corner of every page on Barnes & Noble's website, including the online checkout page. *Id.* at 1174. The Court concluded that even the conspicuous presence of the "Terms of Use" hyperlink on *every* page of the website could not overcome "courts' traditional reluctance to enforce browsewrap agreements against individual consumers. . . . " *Id.* at 1178. "[W]here a website makes its terms

[5] An example cited by the Court as sufficient "other notice" is a textual notice stating: "By continuing past this page and/or using this site, you agree to abide by the Terms of Use for this site." *Cairo, Inc. v. Crossmedia Servs., Inc.*, No. 04–04825, 2005 WL 756610, at *2, *4–5 (N.D. Cal. Apr. 1, 2005).

of use available via a conspicuous hyperlink on every page of the website but otherwise provides no notice to users nor prompts them to take any affirmative action to demonstrate assent, even close proximity of the hyperlink to relevant buttons users must click on – without more – is insufficient to give rise to constructive notice." *Id.* at 1178-79.

Subsequently, courts have consistently applied *Nguyen* and its progeny to hold browsewrap agreements unenforceable when the only "notice" provided to a user is a hyperlink on the website. *See, e.g.*, *McKee v. Audible, Inc.*, No. CV 17-1941-GW(Ex), 2017 WL 4685039, at *8 (C.D. Cal. July 17, 2017) (despite presence of a hyperlink to terms of service, "a reasonable consumer would not be put on notice that the disclosure below the 'Start Now' button actually attached any contractual consequences to clicking *that particular button* to begin a free membership, much less an arbitration agreement contained in an agreement titled 'Terms of Use.'"); *Mitchell*, 2017 U.S. Dist. LEXIS 79064, at *3 (applying *Nguyen* and holding arbitration agreement to be unenforceable where link to contract's terms is buried in an email, with no textual cue to alert the reader to the existence of the link); *Doe v. Xytex Corp.*, No. C 16-02935 WHA, 2016 WL 3902577, at *4 (N.D. Cal. July 19, 2016) ("[W]ithout notifying consumers that the linked page contains binding contractual terms, the phrase 'terms of use' may have no meaning or a different meaning to a large segment of the Internet-using public. In other words, a conspicuous 'terms of use' hyperlink may not be enough to alert a reasonably prudent Internet consumer to click the hyperlink.") (quoting *Long v. Provide Commerce, Inc.*, 245 Cal. App. 4th 855, 867 (2016)); *Opperman v. Path, Inc.*, 205 F. Supp. 3d 1064, 1073-74 (N.D. Cal. 2016) ("hyperlinked, off-screen terms in the Privacy Policies," with no further notice, did not "provide[] users with constructive notice such that they could effectively consent to anything contained off-screen.").

D. Users are not put on notice of Viacom's EULA when downloading *Llama Spit Spit*.

No enforceable agreement was formed between Viacom and Plaintiffs, either in the course of downloading *Llama Spit Spit* or in the course of playing the app. In each instance, Viacom flunked the first two prongs of *Nguyen*'s test, failing to provide *either* a conspicuously-placed

hyperlink or an additional, textual notice alerting Plaintiffs to the existence of its EULA.

1. Viacom's EULA is inconspicuous and unavailable during the download process.

Viacom first argues that Plaintiffs had constructive notice of the EULA in the course of downloading *Llama Spit Spit*. (Mot. at 9.) Yet, Viacom fails to put a reasonable user on notice of its EULA because there is *no* reference – much less a conspicuous reference – to the EULA on the download webpage in the Apple App Store. (Addendum, Fig. 1; Ortiz Decl. ¶ 13, Fig. 3.) To the contrary, this is an instance of paradigmatically non-conspicuous placement. To find any reference to the EULA, a user would have to click the "more" link beneath a marketing blurb about the app, at which point several additional, heretofore-hidden paragraphs of text are revealed. Even if one *were* to click the link, and continue reading, it would only be after additional marketing representations and a separate paragraph of boilerplate legal language that one would find a reference to the EULA. (Addendum, Fig. 2; Ortiz Decl. ¶ 13, Fig. 4.) Further, although the EULA is referenced, *it cannot be accessed or read because Viacom has not provided a usable hyperlink*. (Pollock Decl. ¶¶ 6-8.) Instead, the URL for the EULA is static text that cannot be clicked on or even copied and pasted. (*Id*.) Thus, in order to access and read the EULA, the user must: (1) terminate the download process, (2) transcribe the URL, (3) leave the Apple App Store, (4) open a separate browser, and (5) manually type in the URL.

Such an arduous process patently fails the constructive notice requirement. *See McKee*, 2017 WL 4685039, at *8 (No conspicuousness of terms where "the initial disclosure is not hyperlinked and appears in small, undifferentiated font."). The circumstances here are far from the conspicuously-placed "Terms & Conditions" hyperlink contemplated in *Nyugen*, which itself was set-off by different-colored font on every webpage. 763 F.3d at 1174. Even then, the Court deemed the browsewrap agreement insufficient to provide users constructive notice. *Id.* at 1179. Put more plainly: the EULA is hidden and, ultimately, inaccessible. Courts routinely hold that such links fail to create enforceable contracts. *See Norcia*, 2014 WL 4652332, at *9 (product web page with hyperlink to contract language at issue was "an additional step removed from the actual [contract] language" and therefore too attenuated to provide inquiry notice.); *Mitchell*, 2017 U.S.

Dist. LEXIS 79064, at *2-3 (link "'buried' at the bottom of [an] email where recipients are unlikely to see it" does not create an enforceable browsewrap agreement); *Xytex*, 2016 WL 3902577, at *3 ("Indeed, Xytex placed the link to its site-usage agreement *even more inconspicuously* than the defendant in *Nguyen* had, inasmuch as the link on xytex.com could only be accessed *after* a user pulled down an additional menu, which menu itself had no indication of the nature of the contract hidden within.").

Without a conspicuously-placed, conspicuously-labeled, functioning hyperlink in the download process of *Llama Spit Spit*, Viacom fails to satisfy the threshold requirement of *Nguyen* and thus failed to form an enforceable browsewrap agreement.

2. Viacom does not provide users with sufficient, further notice of its EULA during download.

In addition to Viacom's EULA being inconspicuous and unavailable, nothing in the *Llama Spit Spit* download process provides users *further* notice of the EULA or otherwise indicates to users that, by taking any additional action such as continuing to download the game, they agree to the EULA. This is an *additional* failure of the browsewrap test: for a browsewrap agreement to be enforceable, there must be "something more to capture the user's attention and secure her assent" than a mere hyperlink. *Nyugen*, 763 F.3d at 1178 n.1. Examples provided by the Ninth Circuit include (1) "[a] final screen on [a] website contain[ing] the phrase 'Review terms,'" or (2) a textual notice on every page of the website stating: "By continuing past this page and/or using this site, you agree to abide by the Terms of Use for this site, which prohibit commercial use of any information on this site." *Id.* at 1177-78 (internal quotation marks and citations omitted).

Viacom does not provide any similar indicia of notice for *Llama Spit Spit*. (Mot. at 9; Ortiz Decl. ¶¶ 12-13.) Absent such additional notice, there is no assent to be bound by Viacom's EULA. *Nyugen*, 763 F.3d at 1178-79; *McKee*, 2017 WL 4685039, at *8 (despite presence of a hyperlink to terms of service, "a reasonable consumer would not be put on notice that the disclosure below the 'Start Now' button actually attached any contractual consequences to clicking that particular button … , much less an arbitration agreement contained in an agreement titled 'Terms of Use.'"); *Opperman*, 205 F. Supp. 3d at 1073-74 ("hyperlinked, off-screen terms

in the Privacy Policies," with no further notice, did not "provide[] users with constructive notice such that they could effectively consent to anything contained off-screen."); *Xytex*, 2016 WL 3902577, at *4 ("[W]ithout notifying consumers that the linked page contains binding contractual terms, the phrase 'terms of use' may have no meaning or a different meaning to a large segment of the Internet-using public. In other words, a conspicuous 'terms of use' hyperlink may not be enough to alert a reasonably prudent Internet consumer to click the hyperlink.") (quoting *Long*, 245 Cal. App. 4th at 867).

The download process for *Llama Spit Spit* did not provide Plaintiffs with a conspicuously-placed (or even functioning) hyperlink to Viacom's EULA, nor was there any additional, textual notification directing their attention to the EULA or the consequences of downloading the app, as required by *Nguyen* and its progeny. Accordingly, Viacom cannot demonstrate Plaintiffs' assent to be bound to the terms of its EULA or the arbitration clause contained therein.

E. *Llama Spit Spit* users were not put on notice of Viacom's EULA while playing the app.

1. Viacom's EULA is inconspicuous to children playing the app.

Viacom mistakenly contends that once *Llama Spit Spit* was downloaded, Plaintiff L.L.'s act of playing the game provided her constructive notice of the EULA's existence which, in turn, would obtain her assent to be bound by the arbitration agreement contained therein. (Mot. at 9-10.) Viacom rests its argument exclusively on the presence of the words "Privacy Policy" in the bottom, far-left corner of the screen. (*Id.*; *see also* Addendum, Fig. 3; Ortiz Decl. ¶ 17, fig. 6.) However, clicking the "Privacy Policy" link presents the child user with a box containing four new hyperlinks, one of which reads simply "EULA" with no explanation;[6] only by clicking "EULA" would the child be shown the end user license agreement. (Addendum, Fig. 4; Ortiz Decl. ¶ 17, fig. 7.) Viacom does not claim – nor could it – that a child would be *prevented from* playing the app absent expressing notice of and assent to the EULA. Indeed, the app launches and play begins without any notice of any governing terms, let alone an arbitration agreement.

[6] The three other options are Privacy Policy, Summary of Changes, and Arbitration FAQ. (*See* Addendum Fig. 4; Ortiz Declaration, ¶ 17, Figure 7.)

Courts consistently decline to enforce broweswrap agreements under far less confusing circumstances. Simply placing a "Privacy Policy" link on the homepage – without a link referencing a "terms of service," "end user license agreement," or some other terminology denoting the availability of a contractual agreement for review – does not meet the "clear and conspicuous placement" standard. *Nguyen*, 763 F.3d at 1177 (courts will not "enforce [an] arbitration clause in browsewrap agreement that was only noticeable after a 'multi-step process' of clicking through non-obvious links.") (citing *Van Tassell v. United Mktg. Grp., Ltd. Liab. Co.*, 795 F. Supp. 2d 770, 792-93 (N.D. Ill. 2011)); *Norcia*, 2014 WL 4652332, at *9 (web page with hyperlink to contract language at issue was "an additional step removed from the actual [contract] language" and therefore too attenuated to provide inquiry notice.); *Xytex*, 2016 WL 3902577, at *3 (no conspicuous placement where the link to terms "could only be accessed *after* a user pulled down an additional menu, which menu itself had no indication of the nature of the contract hidden within.").

Second, the acronym "EULA" fails to provide a user with notice of Viacom's putative arbitration agreement. A child who clicks on the Privacy Policy link, is faced with four additional links that subsequently appear and, seeing "EULA" among them, is given no indication – let alone the requisite notice – that a contractual agreement is available for review. Indeed, courts decline to find constructive notice to a website's terms and conditions where, as here, the hyperlink thereto is not suitably explicit. *Xytex*, 2016 WL 3902577, at *3 ("[A] consumer is even less likely to understand the contractual nature of a page concerning 'Site Usage' than one concerning 'Terms of Use.'"); *McKee*, 2017 WL 4685039, at *8 ("[E]ven were a consumer to understand that selecting the 'Start Now' button bound that user to Audible's Conditions of Use, that consumer would also need to surmise that Audible really meant the document titled 'Terms of Use' that appears on the following page.").

Because there is no conspicuously-placed link to binding terms and conditions on the homepage of *Llama Spit Spit*, and because the inconspicuous link is misleadingly labeled at *two stages*, Plaintiffs were not put on constructive notice of Viacom's browsewrap agreement in the course of playing *Llama Spit Spit*. *Nguyen*, 763 F.3d at 1177. Accordingly, Viacom's EULA is

unenforceable and Viacom may not compel arbitration of Plaintiffs' claims.

2. Viacom does not provide users with sufficient, further notice of its EULA while playing the app.

When children play *Llama Spit Spit*, they are not provided with any *further* notice of Viacom's EULA or otherwise informed that, by continuing to play, they will be agreeing to the EULA. To the contrary, the game is designed so that it immediately begins when the app is opened. (Pollock Decl. ¶¶ 11-13.) The absence of any additional notice directing the user's attention to the significance of Viacom's EULA or alerting the user that continued play connotes acceptance of the terms of the EULA provides an additional and independent basis for finding the EULA unenforceable. *See Nguyen*, 763 F.3d at 1178 n.1; Section III.D.2, *supra*.

F. Viacom's cases address websites with conspicuous hyperlinks and additional textual notices, and therefore do not support its Motion.

All of the cases cited by Viacom in its Motion are easily distinguished on their facts, as the browsewrap agreements at issue were: (1) presented via hyperlinks that were conspicuously-placed on the defendant's website,[7] and (2) contained additional, textual notices alerting the website visitor to the existence of the terms of service at issue.[8] Indeed, in some instances,

[7] *Meyer v. Uber Techs., Inc.*, 868 F.3d 66, 78 (2d Cir. 2017) (conspicuous hyperlink where "[t]he entire screen is visible at once, and the user does not need to scroll beyond what is immediately visible to find notice of the Terms of Service."); *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 402 (2d Cir. 2004) (Verio, the party arguing against formation of Browsewrap agreement "visited Register's computers daily…and each day saw the terms of Register's offer; Verio admitted that, in entering Register's computers to get the data, it was fully aware of the terms on which Register offered the access."); *DeVries v. Experian Info. Sols., Inc.*, No. 16-cv-02953-WHO, 2017 U.S. Dist. LEXIS 26471, at *14-15 (N.D. Cal. Feb. 24, 2017) ("The text containing the Terms and Conditions hyperlink was located directly above that button and indicated that clicking 'Submit Secure Purchase' constituted acceptance of those terms."); *Nevarez v. Forty Niners Football Co.*, No. 16-CV-07013, 2017 WL 3492110, at *8 (N.D. Cal. Aug. 15, 2017) (Conspicuous placement where the "Ticketmaster Website's Terms of Use…were always hyperlinked and available for review.") (quotation omitted).

[8] *Register.com*, 356 F.3d at 396 (visitors to the Register.com website would receive textual notice of agreement to be bound, beginning with the phrase "By submitting a WHOIS query, you agree that …" and followed by explicit terms of agreement); *Meyer*, 868 F.3d at 76 ("By creating an Uber account, you agree to the TERMS OF SERVICE & PRIVACY POLICY"); *Nevarez*, WL 3492110, at *8 ("Plaintiffs were explicitly told that by clicking 'Submit Order' they were agreeing to the Ticketmaster Website's Purchase Policy, which further informed Plaintiffs in the first paragraph that their use of the Ticketmaster Website was governed by the Ticketmaster Website's TOU."); *DeVries*, 2017 U.S. Dist. LEXIS 26471, at *14-15 ("The text containing the Terms and Conditions hyperlink was located directly above that button and indicated that clicking

Viacom's own authority *rejected* a defendant's formation argument because one of these requirement was missing.[9] As discussed above, neither of these essential criteria are satisfied in *Llama Spit Spit* and, accordingly, Plaintiffs did not agree to be bound by Viacom's EULA.

G. Plaintiffs did not assent to Viacom's EULA.

Viacom's specious claim that the Complaint infers that Plaintiffs were on actual notice of Viacom's EULA should be rejected. (Mot. at 10-11.) While failing to articulate a specific legal theory, Viacom argues that Plaintiffs should be forced into arbitration on equitable estoppel grounds. (*Id.*) That the Complaint cites content from the Apple App Store does not equate to Plaintiffs' "awareness of language found in the same portion of the app description that discusses the EULA and its arbitration provision" sufficient to manifest Plaintiffs' assent to Viacom's EULA. (Mot. at 11.) This precise argument was expressly rejected by the Ninth Circuit in *Nguyen*. There, the plaintiff attempted to enforce the New York choice-of-law provision while disputing the arbitration provision in the very same terms of service. 763 F.3d at 1179-80. First, the Court noted that "[e]quitable estoppel typically applies to third parties who benefit from an agreement made between two primary parties," and that when analyzing the enforceability of a browsewrap agreement, the plaintiff "is not a third-party beneficiary to [the] Terms of Use, and whether he is a primary party to the Terms of Use lies at the heart of this dispute." *Id.* Second, application of the equitable estoppel doctrine requires that the party avoiding the arbitration provision also seek a "direct benefit" from the contract containing said provision. *Id.* at 1180. Plaintiffs here seek no benefit under Viacom's EULA. Indeed, the Complaint makes no reference to the EULA *at all*. Instead, Plaintiffs cite to Viacom's own description of *Llama Spit Spit*, posted in the App Store,[10] and nothing more. A description of Viacom's marketing representations on the Apple App Store cannot credibly be said to evidence Plaintiffs' notice of Viacom's EULA so as to manifest consent to the EULA's arbitration provision. *Id.*

'Submit Secure Purchase' constituted acceptance of those terms.")

[9] *See, e.g.*, Mot. at 8 (citing *Nguyen*, 763 F.3d).

[10] Specifically, "The Spit is on! Defeat hipster enemies as you collect coins, power-ups and crazy llama costumes, Lllama-tastic (sic) scores can land you on the leaderboard, so what are you waiting for? Get spitting!" (Compl. ¶ 43.)

H. There are no threshold questions for an arbitrator because there is no agreement to arbitrate.

Viacom improperly asks the Court to delegate threshold determinations of "the scope of the arbitration agreement" to the arbitrator. (Mot. at 11.) Such a request misstates the relevant inquiry, the instant facts, and the applicable law. No agreement was ever formed. Arbitration is a contractual matter, and "arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to arbitration." *Int'l Longshore v. Columbia Grain, Inc.*, No. 15-35620, 2017 WL 4816767, at *1 (9th Cir. Oct. 25, 2017) (quoting *Granite Rock Co. v. Int'l Brotherhood of Teamsters*, 561 U.S. 287, 296 (2010)). It is "well settled that where the dispute at issue concerns contract formation, the dispute is generally for courts to decide[,]" not the arbitrator. *Granite Rock*, 561 U.S. at 296; *Burgoon v. Narconon of N. Cal.*, 125 F. Supp. 3d 974, 983 (N.D. Cal. 2015) (the issue of contract formation is "the Court's duty, and not the arbitrator's . . . .").

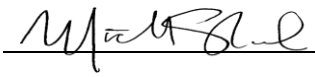
Plaintiffs' position – that they did not assent to be bound by Viacom's EULA – "is plainly a challenge to the *existence* of a binding contract, not to a contract's continued *validity*" as to their claims. *Kum Tat Ltd. v. Linden Ox Pasture, LLC*, No. 14-cv-02857-WHO, 2014 WL 6882421, at *5 (N.D. Cal. Dec. 5, 2014) (emphasis added). Plaintiffs raise "questions regarding contract formation, not contract enforcement[,]" and accordingly they must be resolved by the Court, not an arbitrator. *Id.*

IV. CONCLUSION

For the foregoing reasons, Plaintiffs did not enter into an agreement to arbitrate this dispute with Viacom, and Viacom's Motion should be denied.

Dated: December 22, 2017

Respectfully Submitted,



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ADDENDUM

Figure 1

(Ortiz Declaration, ¶ 13, Figure 3)

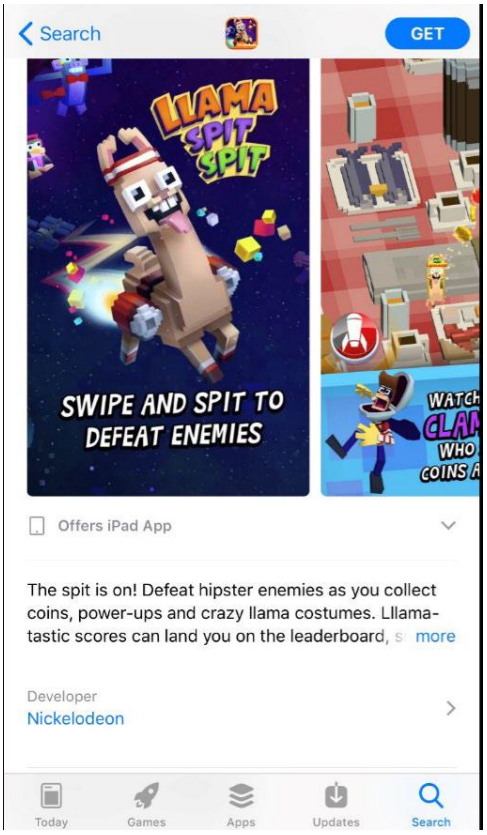

Figure 2

(Ortiz Declaration, ¶ 13, Figure 4)

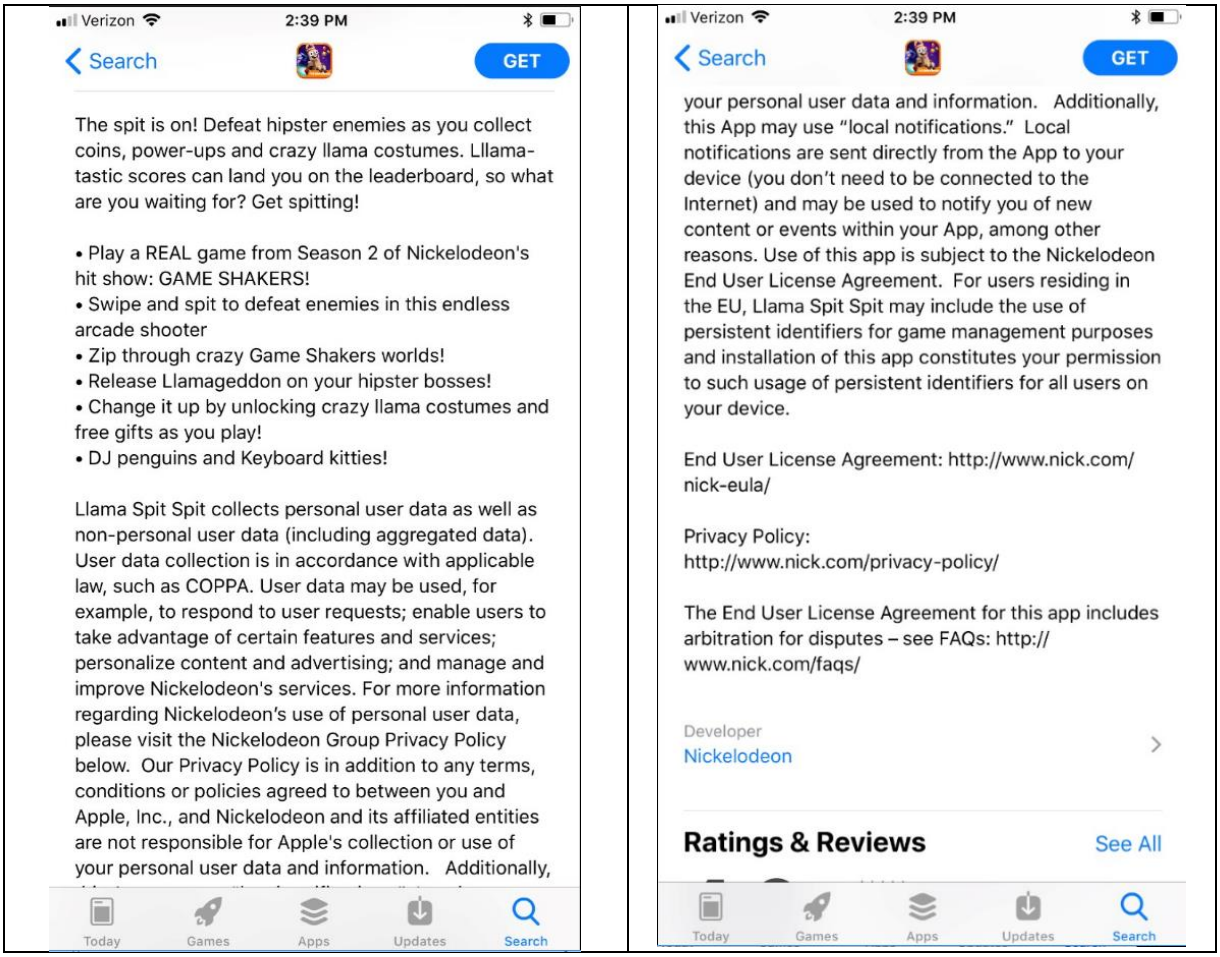

Figure 3

(Ortiz Declaration, ¶ 17, Figure 6)

Figure 4

(Ortiz Declaration, ¶ 17, Figure 7)